IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 102 OF 2005

Kisan @ Krishna Sakharam Patil. ... Appellant.

Versus.

Smt.Ambibai Sakharam Patil. ... Respondent.

Shri S.V.Gavand for the Appellant.

Shri Sanjiv A.Sawant for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 10th February, 2005.

P.C.:

1. Heard the learned Advocates appearing for the parties. The following substantial question of law arises:

> "Whether the Appellate Court was right in holding that under section 47 of the Code of Civil Procedure, 1908, the Court has power to consider the disputes only between the parties to the original suit ?"

The Appeal is admitted on the above substantial question of law.

2. Since the Appeal arises out of the execution proceedings, with the consent of the learned Counsel appearing for the parties, it is taken up for final

hearing forthwith.

3. The Respondent is the original Plaintiff-decree holder. The Respondent filed a suit against one Ramesh Ambaji Patil for possession. The suit was decreed. The decree was put to execution. In execution, the Appellant, who claims that his name is Kisan Sakharam Patil appeared and contended that he is not Ramesh Ambaji Patil and therefore the decree cannot be executed against him. He contended that he was not served with the summons of the suit which was filed against Ramesh Ambaji Patil. He, therefore, submitted that the decree was not binding on him as the decree was not passed against him.

4. The contention of the Respondent was that Ramesh and Kisan were one and the same person. Therefore, evidence was led before the trial Court and the trial Court accepted the case made out by the Appellant. An Appeal was preferred by the Respondent-decree holder. By the impugned Judgment and Decree the said Appeal has been allowed. While allowing the appeal in paragraph 10 of the Judgment, the Appellate Court has held thus:

> "10. The very aspect which in fact is to be considered whether in execution proceeding such kind of evidence can be taken or not. On this point there is one section which

deals with the aspect of that court can consider all relevant factors relating to execution of decree. It is sec.47 of Code of Civil Procedure. However, the opening word of this section, especially sub-section 1 of sec.47, which reads thus:

> "(1) All questions arising between the parties to the suit in which the decree was passed, or their represenatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

After going through the above referred part of sec.47, C.P.Code it appears that dispute should be related between the parties to the original suit. Here if Kisan is pretending that he is not Ramesh, obviously he cannot raise any objection in the execution proceedings and same cannot be entertained. If at all person against whom decree is passed wants to challenge the decree he cannot raise such objection in darkhasta proceeding but by way of appeal against the same. So defendant of the original suit

ought to have decided under which capacity he watns to challenge the decree."

In paragraph 12 of the Judgment, the Appellate Court held thus:

"12. It is settled rule of law that executing court cannot go behind decree. There are certain exceptions to this rule viz. the court passing decree had no jurisdiction to decide the same, decree is nullity for unexecutable on ground of happening or an event and such question even if decided prior to decree again executing court to go into question as it goes to the very root of the matter."

5. The contention of the Appellant was that he was not bound by the decree as he is not the judgment-debtor. The Respondent's case is that the Appellant Kisan and the Judgment-debtor Ramesh are one and the same person. In my view, the Appellate Court committed an error by holding that such a dispute cannot be adjudicated upon under section 47 of the Code. The law on this point is well settled. Even if a person who is a stranger to the decree claims right, title and interest in respect of the suit property, the rights of such a person have to be adjudicated upon only in execution proceedings and

not by way of a separate suit. The said view is taken by the Apex Court in the Judgment reported in (1997) 3 S.C.C. page 694 (Brahmadeo Chaudhari v/s. Rishikesh Prasad).

6. Though there is some discussion by the Appellate Court on evidence produced by the parties, I find that the entire approach of the Appellate Court was wrong and contrary to the law laid down by the Apex Court. Hence the Appellate Court Judgment deserves to be quashed and set aside.

7. Hence I pass the following order:

(i) The impugned Judgment and Order dated 27th October 2004 is quashed and set aside and the Civil Appeal No.129 of 2000 is remanded to the Appellate Court.

(ii) The parties will appear before the Appellate Court on 28th February 2005 at 11.00 a.m. for fixing the schedule of hearing of the Appeal.

(iii) Considering the fact that the Appeal arises out of the execution proceedings and considering the age of the Respondent, the Appellate Court is directed to hear and decide the Appeal as expeditiously as possible and

preferably before 31st July 2005.

(iv) It is made clear that all contentions of the parties on merit are kept open.

(v) The Appeal is allowed in the above terms with no order as to costs.

(vi) The observations made by this Court are only for the purpose of passing of order of remand and the Appeal will naturally be decided on its own merits in the light of the law laid down by the Apex Court.

(vii) The parties and the concerned Court to act on the authenticated copy of this order.

Judge.